Supreme Court No. 80420-6

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY,

Respondent,

v.

T & G CONSTRUCTION, INC., and VILLAS AT HARBOUR POINTE OWNERS ASSOCIATION,

Appellants.

MUTUAL OF ENUMCLAW INSURANCE COMPANY'S REPLY IN SUPPORT OF MOTION TO DISMISS

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1. Enumclaw's Motion is Addressed to the Court's Jurisdiction in *This* case.

Mutual of Enumclaw's ("Enumclaw's") Motion to Dismiss is based on the argument that the Court lacks jurisdiction to hear *this* case - the insurance coverage lawsuit. While the arguments against jurisdiction are similar to the arguments raised in Enumclaw's collateral attack on the judgment in the Construction Defect suit, they apply independently to the authority of the Court to decide the case at bar. The legal and factual nexus between the Motion to Dismiss and the collateral attack is an obvious one; an ex-entity against which the legislature has explicitly, retroactively, stripped the right to be sued should not be allowed to be hailed before the Court.

The Association argues that Enumclaw's Motion to Dismiss is predicated on the failure of jurisdiction of the court in the Construction Defect suit. *Response to Motion to Dismiss at 6-7.* This is a misunderstanding of Enumclaw's Motion.

2. Based on the Retroactive Application of RCW 23B.14.340, T&G Could not be Sued by Enumclaw or Anyone Else at the Time Enumclaw Filed this Lawsuit.

Enumclaw initiated this Declaratory Judgment lawsuit by suing T&G on September 15, 2004, which was more that two years after T&G was administratively dissolved on October 23, 2000 (CP 795). This case

is, from a procedural perspective, remarkably similar to *Ballard Sq. Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603, 146 P.3d 914 (2006). Both cases were initiated under the old RCW 23B.14.340. All briefing was submitted to the Court of Appeals in both cases before the new version of the corporate survival statute was enacted. The issue of the application of the new version of the statute was not even argued by the parties in *Ballard Square* until the Court requested additional briefing on the issue. Nevertheless, the Court ruled that the new statute had withdrawn the grace of the legislature pursuant to which the ex-corporation Dynasty existed, returning it to a state of judicial invisibility. The effect of the legislation was a *nunc pro tunc* destruction of the *right to sue* Dynasty, and this Court dismissed the lawsuit.

Pursuant to the new RCW 23B.14.340, and the confirmation of its retroactivity in *Ballard Square*, neither Enumclaw nor anyone else had the power to invoke the court's jurisdiction against the ex-corporation T&G. The application of RCW 23B.14.340 to the case at bar is being raised for the first time. However, such was also the case in *Ballard Square*; the effective date of the statute in relation to the progress of this appeal, in combination with the jurisdictional instability caused the retroactive "disappearance" of a party to the lawsuit, counsels that this is the only opportunity to consider the impact of the legislative change on this case.

It is appropriate to do so now.

3. This Court should Dismiss this Case for a Failure of Jurisdiction.

The issue on which this Motion is based is jurisdictional.

> Jurisdiction means the power to hear and determine. In order to acquire complete jurisdiction, so as to be authorized to hear and determine a cause or proceeding, the court necessarily must have jurisdiction of the parties thereto and of the subject matter involved. There are in general three jurisdictional elements in every valid judgment, namely, jurisdiction of the subject matter, jurisdiction of the person, and the power or authority to render the particular judgment.

State v. Werner, 129 Wn.2d 485, 493-494, 918 P.2d 916 (1996) (Citations omitted)

The Association does not contest Enumclaw's claim that the termination of the statutory survival period creates a jurisdictional bar to suit. However, the Association prefers to frame the issue as one of jurisdiction of the person, rather than jurisdiction of the subject matter. The basis for the Association's preference is clear. Objections to a failure of personal jurisdiction can generally be waived, and generally cannot be raised for the first time on appeal. *Robb v. Kaufman*, 81 Wn. App. 182, 188, 913 P.2d 828 (1996). In contrast, the failure of subject matter jurisdiction can be raised by any party at any time. *Skagit Surveyors & Eng'rs, L.L.C. v. Friends of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998).

Enumclaw acknowledges that there is precious little caselaw that fully develops the *nature* of the legal deficit created when a corporate entity that might have existed when a lawsuit is filed is retroactively disappeared by legislative fiat while that case is pending[1]. This is likely because retroactive stripping of an entity's ability to be sued is unusual. However, there is little need for authority to establish that such a legal disappearance dramatically interferes with the Court's authority to render a valid judgment on the "rights" of that ex-entity.

a. In Personam *Jurisdiction*

The retroactive application of a corporate survival statute does not fit neatly into traditional personal jurisdiction jurisprudence, although there is intuitive appeal to the notion that it is an *in personam* issue. This is probably because it *seems* like a question of whether a defendant is, or is not, standing before the court - a quintessential *in personam* issue. Normally, when a party appears and defends on the merits, it waives the

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[1] In its opening brief, Mutual of Enumclaw cited the case of *Picardo v. Peck*, 95 Wash. 474, 474-475, 164 P. 65 (1917). The Association argues that "*Picardo's* discussion of jurisdiction is inconsistent with the modern refrains of subject matter or personal jurisdiction." *Response to Motion to Dismiss at 8.* The Association does not elaborate on the "refrains" to which its refers, nor does it cite a single case that is inconsistent with *Picardo*.

Additionally, the Association is critical of the foreign authority cited by Mutual of Enumclaw, stating that it is "unpersuasive, as the cited opinions involve cases where the courts found lack of jurisdiction in the primary cases. None of the opinions voided a judgment from a separate, underlying judgment." *Id. at 7, fn. 2.* Contrary to the Association's position, those cases are on point because, for purposes of *this* Motion to Dismiss, Mutual of Enumclaw is arguing that the Court lacks jurisdiction in *this* case, regardless of the validity of the void judgment from the Construction Defect suit.

defense of personal jurisdiction because it has voluntarily submitted itself to the power of the court, thereby "curing" whatever jurisdictional defect may have otherwise existed. *In re Marriage of Parks,* 48 Wn. App. 166, 170, 737 P.2d 1316 (1987). It is no surprise that such a defendant may not raise *in personam* jurisdiction for the first time on appeal.

If, indeed, the retroactive end of T&G's statutory corporate survival period implicates personal jurisdiction, it is a highly unusual kind of personal jurisdiction. First, the termination of the survival period cannot be "waived" by a corporation. As noted in *Ballard Square,* corporations are a legal fiction, that have only the powers granted to them by the legislature. Once the legislature withdraws a corporation's ability to appear in court and defend in its corporate name, there is nothing the corporation can do (short of advancing new, retroactive legislation) to recapture the "grace" by which it is capable of that appearance. *Id.* Wavier is the intentional relinquishment of a known *right* (*Jones v. Best*, 134 Wn.2d 232, 950 P.2d 1 (1998)) and the ex-corporation cannot "waive" a "right" that does not belong to it.

Additionally, in this odd case of retroactive legislation, ex-T&G could have had no way of "knowing" that such legislation was coming. Thus it is theoretically impossible that T&G intentionally relinquished a *known* right. If such a wavier is impossible, there is no bar to presenting

the issue for the first time on appeal - at "any time." If *in personam* jurisdiction is the proper context in which to interpret the issue of T&G's retroactive disappearance, it was not the kind of jurisdictional failure that could be waived by ex-T&G. Regardless of the cause, a reputed defendant's inability to waive that defect could not *increase* the Court's jurisdictional stability.

b. Subject Matter Jurisdiction

The fact that ex-T&G was legislatively disabled from appearing to defend itself in this case, and that waiver of the disability was not possible, makes the defect more closely resemble a failure of subject matter jurisdiction. There is a absence of subject matter jurisdiction where the courts do not have authority to entertain the class of dispute to which a lawsuit belongs. *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 76 P.3d 1183 (2003). In *Ballard Square*, this Court ruled that class of dispute against a corporation was statutory, regardless of the nature of the dispute, because a corporation can only be sued by statutory authorization. *Ballard Sq. Condo. Owners Ass'n v. Dynasty Constr. Co.*, 158 Wn.2d 603. This conclusion was the core basis for the Court's retroactive application of RCW 23B.14.340. *Id.*

In the case at bar, Enumclaw attempted to sue T&G for a declaration of what was, and was not, covered by an insurance policy.

Although neither Enumclaw nor ex-T&G could not have known it at the time, a subsequently enacted corporate survival statute retroactively stripped ex-T&G's ability to appear in court to defend itself in this case. Because the cause of action against ex-T&G was statutory, and the legislation that had once enabled T&G to appear in court was altered *nunc pro tunc* to explicitly *prohibit* it from doing so, the Court lost the ability to hear the class of dispute to which this case belongs. That implicates a lack of subject matter jurisdiction, which may be raised at any time, by any party.

c. Authority to Render a Judgment

As this Court held in *Werner*, in order render a valid judgment, the Court must possess (capital "J") Jurisdiction, which consists of three elements: jurisdiction of the subject mater, jurisdiction of the person, and the authority to render a judgment. *State v. Werner*, 129 Wn.2d at 494. In *Werner*, the issue was the degree to which Pierce County Superior Court had Jurisdiction over a juvenile criminal defendant, where the legislature had assigned such cases to juvenile court. The Court found that Pierce County Superior Court had both subject matter and personal jurisdiction over the juvenile, but that the legislative assignment of the case to juvenile court was an absolute inhibition to the Superior Court's ability to render a valid judgment. "The issue, then, is not whether the adult division of the

Pierce County Superior Court had the power to hear and determine the charges against Dyer. It did not." *Id. at 495.*

Legislative determinations of who may appear before which courts, then, can affect a court's "power to hear and determine" a case. And a failure of the "power to hear and determine" a case leads unavoidably to a lack of Jurisdiction. *Id.* The third Jurisdictional requirement - that the court have the power to hear and determine a case - may be the orphan Jurisdictional child whose job it is to explain the inability of a court to hear cases where the impediment to judicial action does not fit cleanly under the heading of subject matter or personal jurisdiction. In any event, such power is a prerequisite for the Court to have Jurisdiction, which is, in turn a prerequisite for a valid judgment.

In the case at bar, Enumclaw commenced a lawsuit by suing T&G for a declaratory judgment. Because T&G was not legislatively enabled to appear and defend itself, the trial court did not have the power to hear and determine the case, and thus did not have Jurisdiction. That defect is incurable, and persists on appeal.

4. Enumclaw Waived Nothing.

There is no doubt that Enumclaw intended to invoke the court's jurisdiction over T&G in this case. However, like ex-T&G, Enumclaw could not have waived a right that did not exist when it filed suit. Nor

could Enumclaw waive a jurisdictional defect that infects the health and integrity of any judgment that this Court could render. Even if the effect of T&G's dissolution is best cognized as creating a failure of personal jurisdiction, the reason that personal jurisdiction issues generally cannot be raised for the first time on appeal is that they are self-curing. If a defendant makes it through the trial court without asserting a personal jurisdiction defense, it has submitted itself to the court's power. *In re Marriage of Parks,* 48 Wn. App. 166. Where an ex-corporation defendant is retroactively legislatively prohibited from appearing to defend itself, there is no cure. All of the policy reasons for which any party is free to challenge subject matter jurisdiction at any time apply with equal force to the jurisdictional challenge presently before the Court, however denominated.

5. The Presence of the Association did not "Cure" the Jurisdictional Defect.

The Association was the party claiming a right against T&G, and thus was a necessary party under the Uniform Declaratory Judgment Act (RCW 7.24). *Glandon v. Searle,* 68 Wn.2d 199, 202, 412 P.2d 116, 119 (1966). However, the only basis for the Association's presence as a defendant in this case was to bind it to the declaratory judgment between Enumclaw and T&G. In that capacity, the Association follows the

fortunes of T&G. If the Court does not have authority to adjudicate Enumclaw's claims against T&G because of a jurisdictional bar, the proper dismissal of ex-T&G fully resolves the issue of insurance obligations and the Association has no other interest in the lawsuit.

The Association, however, also claims it is entitled to step into ex-T&G's shoes as an assignee of ex-T&G's rights with respect to T&G's insurance policy. There is no question that the Court has personal jurisdiction over the Association. However, the only possible construction of this argument is that the Association, as assignee, is entitled to assert rights greater than those of its assignor. This result is specifically prohibited by Washington law. *Morse Electro Prods. Corp. v. Benefit Indus. Loan Co.*, 90 Wn.2d 195, 198, 579 P.2d 1341 (1978). Because infirmities in the rights of ex-T&G apply with equal strength to the Association as the assignee of those rights, the purported assignment cannot cure a jurisdiction defect that exists but for that assignment. *Id.*

6. Conclusion

Enumclaw respectfully requests that the Court dismiss this matter.

RESPECTFULLY SUBMITTED THIS 16th day of May, 2008.

HACKETT, BEECHER & HART
/s/* (Original Signature on File)

Brent W. Beecher, WSBA #31095
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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury that on Friday, May 16, 2008, she caused a copy of the Respondent Mutual of ~~Enumclaw's Answer to~~ Petitioner's Petition for Review to be served on the following:

Daniel Zimberoff
Barker - Martin
719 2nd Avenue, Suite 1200
Seattle, WA 98104

/s/* (Signature on File)

...S AS ATTACHMENT
TO E-MAIL

Linda Voss
Hackett, Beecher & Hart

OFFICE RECEPTIONIST, CLERK

To: Linda Voss
Cc: danzimberoff@barkermartin.com
Subject: RE: Case No. 80420-6 Mutual of Enumclaw Ins. Co.'s Reply in Support of Motion to Dismiss

Rec. 5-16-08

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From: Linda Voss [mailto:lvoss@hackettbeecher.com]
Sent: Friday, May 16, 2008 2:53 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: danzimberoff@barkermartin.com
Subject: Case No. 80420-6 Mutual of Enumclaw Ins. Co.'s Reply in Support of Motion to Dismiss

Dear Clerk: Enclosed for filing is Mutual of Enumclaw Insurance Company's Reply in Support of Motion to Dismiss (including Certificate of Service).

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